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No. 91-1947

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DEAN A. FIRTION,

Petitioner,

vs.

MARK HEBERT and RODNEY FOREY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MARK HEBERT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred in affirming the judgment of the district court on the basis that the Respondents were entitled to qualified immunity as a matter of law.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MARK HEBERT

STATEMENT OF THE CASE

The Petitioner has presented a statement of the case setting forth the general background of this action. Respondent Hebert finds it necessary, however, to bring some corrections and additions to the attention of the Court. Record cites are to the

trial transcript (T) or joint appendix (JA) filed in the Second Circuit.

The events which gave rise to this action began in the early morning hours of May 7, 1988, when the Petitioner and several friends converged on a motel room in Brattleboro, Vermont, following an evening at a local bar (T.Vol.I: 32, 68, 72, 77-78). Guests in the motel complained to the desk clerk about the noise in the room occupied by Petitioner (T.Vol.II: 78) (JA 224). The clerk warned the occupants that they would have to quiet down or leave the motel, however, the warning proved to be ineffective (T.Vol.II: 85, 87) (JA 230, 232). The desk clerk telephoned the Brattleboro Police Department and Respondent Hebert, a Brattleboro police officer, was dispatched to the motel (T.Vol.II: 87-88) (JA 491).

The desk clerk advised Respondent Hebert of both the noise complaint and the fact that occupancy of the room was limited to three people (T.Vol.II: 79, 89) (JA 225, 492). Further, Respondent was informed that if the occupants did not cooperate, everyone was to leave the room (T.Vol.II: 89) (JA 492).

Respondent Hebert proceeded to the motel room and, with his flashlight in his left hand, knocked on the door (T.Vol.III: 137) (JA 303). Petitioner opened the door and engaged in a short conversation with Respondent Hebert during which Respondent confirmed that a party was underway and that there were more than three people in the room (T.Vol.I: 36; Vol. III: 129; Vol.IV: 69) (JA 166, 299, 513).

As Respondent Hebert was explaining to Petitioner that he and his friends were going to have to leave, Respondent stepped into the doorway (T.Vol.III: 129) (JA 299). Petitioner slammed the door, pinning Respondent between the door and the door frame in such a manner that his left arm was inside the room

(T.Vol.III: 132, 160; Vol.IV: 70). Respondent, fearing for his safety, (T.Vol.III: 133; Vol.IV: 71) (JA 301, 342) attempted unsuccessfully to push the door open to free his arm (T.Vol.III: 163) (JA 314). He then flicked his left wrist, intentionally striking Petitioner in the forehead with his flashlight with just enough force to free himself[1] (T.Vol.III: 60) (JA 459). Petitioner released the door and Respondent called for backup (T.Vol.IV: 72).

Petitioner was charged with and convicted of the criminal offense of simple assault by reason of his slamming Respondent Hebert in the doorway (T.Vol.I: 5-6, 10-11).

Petitioner filed suit in the United States District Court for the District of Vermont in May of 1990, alleging a cause of action pursuant to 42 U.S.C. § 1983 and asserting various state law claims. Petitioner did not, as suggested in his Petition, invoke diversity jurisdiction pursuant to 28 U.S.C. § 1332.

Trial was held in the United States District Court for the District of Vermont, the Honorable Franklin S. Billings presiding, on March 26, 1991, through April 3, 1991. At the conclusion of the Petitioner's case, Respondent Hebert moved for a directed verdict based, in part, on qualified immunity. The motion was denied (T.Vol.IV: 166) (JA 6). The motion was renewed at the close of all the evidence and denied (T.Vol.V: 134-38) (JA 7). The case was submitted to the jury and a verdict was returned in favor of Respondent Hebert.

Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the judgment

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1. In his statement of the case, Petitioner incorrectly implies that Respondent Hebert forced his way into the motel room because of evidence of marijuana use and struck the Petitioner because Petitioner resisted entry. Petition for Certiorari, at 6. These assertions are not supported by the record.

of the district court. In a unanimous, unpublished decision, the Second Circuit found that it need not reach the numerous claims of error advanced by Petitioner on appeal because it was objectively reasonable for the Respondents to believe that their actions did not violate Petitioner's clearly established rights, and therefore, the Respondent was entitled to qualified immunity as a matter of law. *Firtion v. Hebert,* No. 91-7782 (2nd Cir., Jan. 23, 1992). Petitioner now seeks review of that decision by writ of certiorari.

SUMMARY OF ARGUMENT

Respondent Hebert opposes the request by Petitioner for a writ of certiorari to determine whether the Second Circuit erred in concluding that the Respondents were entitled to qualified immunity as a matter of law.

The Second Circuit correctly stated the standard for application of the doctrine of qualified immunity. There is no basis to infer that the Second Circuit rendered a decision in conflict with the opinions of other United States courts of appeals. Petitioner's argument relies entirely on two inapposite hypothetical interpretations of the decision of the Second Circuit and fails to provide this Court with a basis to grant certiorari.

REASONS FOR DENYING THE WRIT

I.

The Second Circuit Correctly Determined that the Respondents Were Entitled to Qualified Immunity as a Matter of Law.

In an effort to create a reviewable question where none exists, the Petitioner has mischaracterized the holding of the Second

Circuit by hypothesizing that the Second Circuit substituted its judgment as to a factual issue for that of the district court. The Petitioner claims that the Second Circuit "*implicitly* held that the District Court erred in deciding as a matter of fact that a reasonable jury might have found for the Petitioner if the jury viewed the evidence in the light most favorable to the Petitioner." Petition for Certiorari, at 14 (emphasis added). Nowhere, however, does the Second Circuit determine that any factual findings were even made by the district court, much less made erroneously.[2]

The Second Circuit commences its analysis by applying the traditional rule that it can affirm the judgment of the district court on any ground supported by the record. Petitioner does not argue in his Petition that the Second Circuit's statement of the rule conflicts with applicable law. Indeed, Petitioner could not so argue because the cornerstone for this precept is found in the decisions of this Court. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

The Second Circuit proceeds to simply, and accurately, recite the standard for applying qualified immunity in concluding that "[b]ecause it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights, *Robison v. Via*, 821 F.2d 913, 921 (2nd Cir. 1987), appellees are entitled to qualified immunity as a matter of law." *Firtion v. Hebert, supra* at 2. This holding is a correct application of the decisions handed down by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987).[3] Because Petitioner cannot argue that the Second Circuit

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2. The record is silent as to the district court's rationale for denying the Respondent's motion for directed verdict.

3. In addition, this Court has observed that qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly

(Cont'd)

misstated the legal standard for qualified immunity, he has engaged in a plethora of postulation which fails to alter the fact that his argument is based upon a faulty premise not supported by the decision of the Second Circuit.

II.

The Decision of the Second Circuit Does Not Conflict With Decisions of Other Courts of Appeals.

A. The Second Circuit used the correct standard of review.

Petitioner argues that in reaching its decision the Second Circuit erroneously applied a directed verdict standard that conflicts with other circuits. How Petitioner arrives at that conclusion is a mystery.

The decision of the Second Circuit contains no express language indicating the exact standard of review applied by the court. Nonetheless, Petitioner seeks to infer from the court's silence that the Second Circuit inexplicably chose this case to use an anomalous standard of review. This reasoning is not supported by well settled case law of the Second Circuit or by the decision rendered in this case.

In its discussion of the appropriate standard for review, the Second Circuit cites to *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2nd Cir. 1974). *Bigelow* not only provides the rationale for affirmance on any basis supported by the record; it also succinctly states the standard uniformly applied by the Second Circuit when reviewing the disposition of a motion for directed verdict.

(Cont'd)
violate the law . . . . [I]f officers of reasonable competence could disagree on the issue immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 349-50 (1986).

> In determining whether a motion for directed verdict should be granted, the evidence must be viewed most favorably to the party against whom the motion is made . . . . The non-moving party is given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached.

506 F.2d at 554 (citations omitted).[4]

The standard of review utilized by the Second Circuit is completely consistent with that of every circuit,[5] and with this Court's pronouncement of the standard in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).[6]

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4. *Accord, Vasbinder v. Ambach*, 924 F.2d 1333 (2nd Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2nd Cir. 1990); *Granite Computer Leasing Corp. v. Travelers Indemnity Co.*, 894 F.2d 547 (2nd Cir. 1990) and *Knight v. United States Ins. Co.*, 804 F.2d 9, 10-12, (2nd Cir. 1986); *cert. denied*, 480 U.S. 932 (1987). *Vasbinder*, decided a month after the present action, reaffirms the Second Circuit's continuing adherence to the prevailing standard of review.

5. Petitioner merely identifies five other circuits which follow the customary standard of review, when in fact, every circuit has adopted this standard. *Accord, Charles Jacquin Et Cie, Inc. v. Distileria Seralles, Inc.*, 921 F.2d 467 (3rd Cir. 1990); *Ingram Coal Co. v. Mover Ltd. Partnership*, 892 F.2d 363 (4th Cir. 1989); *Lloyd v. John Deere Co.*, 922 F.2d 1192 (5th Cir. 1991); *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990); *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650 (8th Cir. 1989); *Kaiser Development Co. v. City and County of Honolulu*, 913 F.2d 573 (9th Cir. 1990); *Federal Deposit Insurance Corporation v. Palermo*, 815 F.2d 1329 (10th Cir. 1987); *Pelletier v. Stuart James Co., Inc.*, 863 F.2d 1950 (11th Cir. 1989).

6. *Liberty Lobby* is specifically cited as authority in the *Vasbinder* case.

By citing to *Bigelow*, the Second Circuit effectively disposes of Petitioner's contention that a conflict exists between the Second Circuit and the other United States courts of appeals regarding the directed verdict standard.[7]

Absent conflict with this Court's directed verdict standard and absent conflict with the other circuit courts' directed verdict standards, review on this issue is not necessary. Certiorari need not be granted to review Petitioner's hypothetical contention that an erroneous standard was applied.

B. It was not error for the Second Circuit to refuse to apply state law standards because the trial court did not exercise diversity jurisdiction.

Petitioner argues that the Second Circuit was obligated to apply Vermont law as is the general rule in diversity cases. This argument must fail, however, because the Petitioner failed to meet the pleading requirements necessary to confer diversity jurisdiction.

Contrary to Petitioner's statement of the case, it does not "appear" from the complaint that diversity jurisdiction existed.[8] Petitioner did not include a statement of jurisdiction in his complaint or in his brief to the Second Circuit. The complaint simply alleged that this matter was a civil action pursuant to 42 U.S.C. § 1983, the Vermont Constitution and various state statutes.

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7. In order to give any consideration to the argument advanced by the Petitioner, one must first conclude that the Second Circuit chose to disregard its own precedent. There is no basis to so conclude.

8. "The essential elements of diversity jurisdiction must be alleged in the pleadings." 13B C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3603 at 372 (2d ed. 1984).

Each required element of 28 U.S.C. § 1332 was conspicuously absent from Petitioner's complaint. The requisite amount in controversy in excess of $50,000.00[9] was not alleged in the complaint and diverse citizenship of the parties was not expressly pleaded.[10] Consequently, Petitioner's complaint failed to provide the trial court with the basis to confer diversity jurisdiction. The

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9. Diversity jurisdiction attaches only in cases where the amount in controversy exceeds $50,000.00. 28 U.S.C. § 1332. The amount must be alleged "upon the face of the complaint." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938). "The general federal rule has long been to decide what the amount in controversy is from the complaint itself." *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961). This rule stems from the broader principle which states that whenever a jurisdictional amount is required, "plaintiff must properly allege the amount in controversy." 14A C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3702 at 16 (2d ed. 1984) (*citing, Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

Petitioner failed to allege the requisite amount in excess of $50,000.00 in his complaint. Nowhere on the face of the complaint was a dollar amount alleged with respect to damages. Petitioner's complaint merely alleged general damages. Because the complaint did not contain the specific dollar amount required by the statute, diversity jurisdiction did not exist at the trial level.

10. Where jurisdiction "depends upon the citizenship of the parties, such citizenship . . . should be distinctively and positively averred in the pleadings." *Anderson v. Watt*, 138 U.S. 694, 702 (1891). For diversity jurisdiction to attach, a complaint must affirmatively allege on its face the diverse citizenship of the various parties to the action. *Realty Holding Co. v. Donaldson*, 268 U.S. 398 (1925). "An allegation of 'residence' alone is not enough." 13B C. Wright, A. Miller & F. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3611 at 517 (2d ed. 1984) *(citing, Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377 (1904), *Neel v. Pennsylvania Co.*, 157 U.S. 153 (1895), *Bingham v. Cabot*, 3 Dall. (3 U.S.) 302 (1798)). In his complaint, Petitioner refers to each party merely as "residents" of their respective states. Petitioner's failure to plead the citizenship of each party precluded the trial court from conferring diversity jurisdiction.

case was correctly treated as a federal question case only.

The premise for Petitioner's contention that state law should have been applied is fundamentally flawed owing to Petitioner's failure to observe the pleading requirements necessary to invoke diversity jurisdiction. Certiorari should not be granted on this claim of error.

C. The directed verdict standard utilized by the Second Circuit is identical to the standard utilized by the Vermont Supreme Court.

Petitioner suggests that the Second Circuit may have used a directed verdict standard which differs from that utilized by the Vermont Supreme Court. Contrary to Petitioner's suggestion, however, the Vermont Supreme Court utilizes the same standard for directed verdict review as this Court, the Second Circuit and the other United States courts of appeals.[11]

At the time of trial, Vermont Rule of Civil Procedure 50 was identical to Federal Rule of Civil Procedure 50.[12] Similarly, Vermont case law defining the standard for application of the directed verdict standard mirrors federal law. Any claim of error based on the refusal to apply state law is, therefore, inconsequential because an application of Vermont law would not result in the use of a different directed verdict standard.

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11. *See e.g., Smith v. Gainer,* 153 Vt. 442, 571 A.2d 70 (1990); *Grann v. Green Mountain Racing Corp.*, 150 Vt. 232, 551 A.2d 1202 (1988). *Lussier v. North Troy Engineering Co.,* 149 Vt. 486, 544 A.2d 1173 (1988), *Sachse v. Lumley*, 147 Vt. 584, 524 A.2d 599 (1987), *Kinzer v. Degler*, 145 Vt. 410, 491 A.2d 1017 (1985).

12. Although FED. R. CIV. P. 50 was amended subsequent to trial, the amendment effects no change to the standard of review.

CONCLUSION

For the reasons stated in this Brief, Respondent Hebert asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1332:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —.

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Appendix (Cont'd)

Vt. R. Civ. P. 50:

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.